No. 3034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY, and SAM SALLO,
Appellants,

vs.

H. GREENBERG,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO.

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BRIEF FOR APPELLEE.

Statement of the Case.

This is a suit for an accounting and dissolution of a mining co-partnership. This cause was first before the Circuit Court on appeal from an interlocutory order refusing the plaintiff a receiver in the court below (203 Fed. 678). Subsequently, the case was tried in the court below on its merits, and reached this court on appeal from the decree of the lower court entered on the merits. On the former appeal (Lesamis et al. v. Greenberg, 225 Fed. 449), the complete transcript of all the testimony, evidence and exhibits was before the court,

and the decree of the lower court was affirmed except to modify one of the findings.

When the case reached the lower court again, amended findings were signed and filed and an amended decree entered thereon, in conformity with the opinion and mandate of the appellate court. The appellants now bring the case back to this court on a second appeal, and have combined several appeals in one petition (Tr. pp. 137-139), on the pretext of appealing from the amended decree entered in accordance with the mandate of the appellate court. Appellants attempt to appeal, (1) from the amended decree, (2) from the order of the lower court overruling appellants' motion for amended findings, (3) from the order of the court overruling the appellants' motion to re-amend the findings and decree and make a new accounting between the parties, and (4) from an order of the court refusing to set aside the sale on execution.

Contentions of Appellee.

Appellee contends that, under the rule of "the law of the case" none of these appeals can be maintained or considered except the appeal from the amended decree. And appellee further contends that the amended findings and amended decree, entered by the trial court, were in strict conformity and obedience to the opinion and mandate of the appellate court entered on the former appeal.

Argument and Authorities.

The appellee, plaintiff in the court below, brought this suit for an accounting and dissolution of a mining co-partnership. The suit was tried in the lower court and all of the parties and their attorneys appeared and participated in the trial. A voluminous record of testimony and exhibits was offered before the trial court, which found for the appellee. Thereafter, the appellants took an appeal from the decree, bringing a complete and full transcript of all of the evidence, testimony and exhibits to the appellate court, which was fully examined on the former appeal and the judgment of the trial court affirmed in every particular, except as to one finding pertaining to the construction of the original agreement between the parties, as to the manner of payment for the mining property.

In order for the court to fully understand appellee's position and contention that under the rule of "the law of the case" appellants have had their day in court and that the matters are res judicata, we deem it necessary to direct the court's attention to the errors that were assigned on the former appeal. Appellants on said appeal (Cause No. 2514, Tr. p. 245) assigned twenty-four errors for the court's consideration. Subsequently, on page 8 in their elaborate brief filed by them on said appeal, appellants selected from said twenty-four errors so assigned ten errors, as follows:

> "1. The court erred in finding that the $24,000.00 balance of the purchase price agreed

to be paid by appellee for an undivided quarter of the mining claims mentioned in the complaint were to be paid 'from the net profits of the mining operations' (assignment of error No. 1), and 'from the mining operations of the co-partnership property' (assignment of error No. 9), and 'from the profits of the co-partnership property' (assignment of error No. 12).

2. The court erred in finding that the placer claims mentioned were partnership assets (assignment of error No. 3).

3. The court erred in finding that the mining claims mentioned in the complaint were liable for the debts of the partnership (assignment of error No. 11).

4. The court erred in finding that the leases were let by the partnership and that royalties were payable to the partnership (assignment of error No. 4).

5. The court erred in finding that the claim of Philip Murphy was a debt of the Klery Creek Mining Co. and in adjudicating said claim and giving it preference over the claims of other creditors (assignment of error No. 7).

6 The court having found in its opinion and findings that Stanley and Sallo, representing Lesamis and Garbin, were entitled to a credit for assessment work done on the claims, erred in failing to recognize and allow this claim in the judgment (assignment of error Nos. 13 and 19).

7. The judgment or decree is erroneous in that it embodies the errors in the findings above specified and further as specified in the 21st assignment of error as follows:

It was final in character, but entered before all partnership matters were disposed of, and without disposition of same.

a. No opportunity was afforded creditors to present their claims.

b. No provision was made for the collection of claims due the firm.

c. No disposition of the attachment of the creditor Murphy was made, and the same was ignored.

d. The claim of $2400.00 of Stanley and Sallo allowed in the findings, was wholly forgotten. So, also, credit of Frank Lesamis as per testimony of Greenberg, $1,-158.00.

e. The claims of the partners inter esse, after exhausting partnership assets, were left undetermined.

f. No apportionment was made of the balance of the twenty-four thousand dollars due defendants.

g. No partner, master or receiver was appointed to take over the properties and wind up the partnership.

h. The findings were made to operate as an interlocutory judgment of dissolution and partial accounting.

8. The court erred in denying defendants' motion to quash the execution issued herein (assignment of error No. 22).

9. The court erred in denying defendants' motion to continue on terms the sale on execution herein until the determination of the appeal from the judgment herein (assignment of error No. 23).

10. The court erred in confirming the sale on execution herein (assignment of error No. 24)."

After specifying in their brief the said ten errors above quoted, from the said twenty-four errors originally assigned, the appellants then discussed in their said brief six of the said ten errors. The errors so discussed, covering the very errors that

are now assigned on this second appeal by said appellants. We find the appellants on the present appeal assigning (Tr. p. 129) fourteen alleged errors, nearly all of which were the same identical errors assigned on the former appeal, as can be readily seen by a reference to the same. Appellants on this appeal, forgetting that they had only assigned fourteen errors in the court below, as shown by the transcript, have assigned twenty errors in their brief, and a perusal of the twenty errors assigned will show that they have specified all of the errors relied upon on the former appeal, in addition to the alleged error that the trial court did not enter the amended findings and decree in accordance with the mandate of the appellate court on the former appeal.

Counsel for appellants, in opening their argument in their brief, say that some of the errors pointed out might have been made on a re-argument if seasonably discovered, but apologize for not having discovered the same because Alaska is too far away from San Francisco. The appellants on the former appeal, were represented by San Francisco counsel, who was present and made an oral argument in the case and could have very easily filed a petition for a rehearing, which should have been done if appellants were dissatisfied with the decision of the court in the former appeal. It is appellee's contention that a petition for a rehearing was the only remedy of appellants. If they were aggrieved or dissatisfied with the decision of the appellate court

on the former appeal, they should have filed a petition for a rehearing and pointed out any errors or mistakes that were made.

With a complete transcript of all the testimony before the appellate court on the former appeal and after hearing the oral arguments and considering the written briefs filed in the case, the court passed squarely upon all of the material errors assigned in the record.

After holding that the parties meant by "of the first money taken out of the ground", one-fourth of the gross, instead of one-fourth of the net gold, the court then says in its opinion (Lesamis et al. v. Greenberg, 225 Fed. 452) as follows:

> "Taking the court's findings as to the gross products of the mines, which is: For the year 1910, $16,251.42; 1911, $9,786.88—aggregating, $26,038.30—the appellee would be entitled to have one-fourth thereof, or $6,509.57, applied on the $24,000 deferred payment. In other words that amount on a settlement would be coming to each of the parties. But, as the business of the firm resulted in a deficit, the adjustment must be apportioned in the payment of the indebtedness of the firm. So apportioning it, the amount of the indebtedness to the mining company of each of the appellants Lesamis, Tyapay, and Garbin, as found by the trial court, would be reduced by $1,553.88, and that of appellee increased by $4,661.66, leaving such indebtedness as follows:
>
> | | |
> |---|---|
> | Lesamis | $2,875.33 |
> | Tyapay | $3,149.33 |
> | Garbin | $2,661.52 |
> | Greenberg | $10,628.76 |
> | Total | $19,314.94 |

The finding of the trial court should be modified to conform to this deduction.

As sales of assets are made, of course, the partners will share equally in the proceeds, and be entitled to have the same applied in that proportion to their indebtedness to the firm and the adjustment in the end will be on the basis of an equal division of the partnership property.

The amount of the indebtedness thus found due by the partners to the firm is the amount of the indebtedness of the firm to Robinson, Magids & Co., or Philip Murphy, the assignee, which is practically all its indebtedness. The testimony shows but one small account above that, of $2.50, and no one is insisting upon that.

It is next insisted that the mining claims did not constitute partnership property. But we are of the view that such claims were intended by the parties to become partnership property, and they were so treated by the parties while conducting the business of the firm. The claims are therefore subject to the partnership indebtedness as partnership assets.

Again, the appellants urge that the last year's business was conducted by Greenberg alone, and not by and on account of the firm. This is wholly refuted by the strong preponderance of the evidence, and, the trial court so finding, it is unnecessary that we here make further comment upon the testimony.

Further objections are urged, namely, that Robinson, Magids & Co. were given a preference over other claims, that Stanley and Sallo were entitled to credit for assessment work, and that the decree was prematurely entered. We have examined these, and find them without merit.

Error is also assigned because of the court's refusal to quash the execution, on motion directed to that purpose. It is first suggested that

the clerk has no authority to issue execution upon judgments of this nature. The Civil Code of Alaska directs that, on judgments in actions at law, the clerk shall issue the execution. Section 267, Civil Code, Alaska (Fed. Stat. Ann. 101); and by Section 382 (1 Fed. Stat. Ann. 126). This provision is made applicable in equitable judgments, so far as the nature of the judgment may require or admit.

The ordinary practice in equity is, where the property is directed to be sold by the master or the marshal, as the case may be, for the clerk to issue to the officer a certified copy of the decree, and with this in hand the officer executes the decree by sale, return, etc., and upon his return of the sale, if regular, it is confirmed by the court.

If there was irregularity here, in issuing an execution by the clerk, instead of making and delivering to the officer a certified copy of the decree for his execution, that was an irregularity merely, which is cured by the confirmation, and no error can be assigned respecting it at this time. The property seems to have been advertised and sold in conformity with the statute of Alaska Civil Code, Sec. 278 (1 Fed. Stat. Ann. 105).

It is next objected that there was no levy. The Alaska Code is taken bodily from the Oregon statute, and it has been held that, under the Oregon statute, where the judgment is a lien upon real property, no levy of the execution is necessary. This in a suit for foreclosure. Bank of British Columbia v. Page, 7 Or. 454. but the usual method of sale in equity procedure is by direction in the decree that the property be sold by a master. 2 Bates on Fed. Eq. Procedure 772. And we see no reason why the practice may not apply in equitable actions, in the jurisdiction of Alaska, where the nature of the judgment is not suited to the ordinary

execution provided for by code. The decree in the case at bar provides that the marshal of Alaska shall sell the assets. It was not requisite for an execution of the decree that any independent or subsequent order of the court be made.

Again, it is urged that, under the motion, the court should have postponed the sale until the appeal to this court was heard. Section 508, Alaska Code (1 Fed. Stat. Ann. 148), provides that all provisions of law regulating the procedure and practice, in cases brought by appeal or writ of error to the Supreme Court or the Circuit Court of Appeals, shall regulate the procedure and practice pertaining to appeals and writs of error from the Alaska courts. The Revised Statutes of the United States provides for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal.

Finding No. 11 will be changed to conform to this opinion, and the decree will be modified accordingly. Otherwise, it will be affirmed, neither party to recover costs on the appeal."

It will be seen, by reading the former opinion, that this Honorable Court then carefully considered the errors assigned and now complained of in this second appeal by appellants, and affirmed the decree of the lower court in every particular, except as to the method or manner in which the payments for the mining claims were to be made by the appellee.

In accordance with the foregoing opinion, the mandate of this court was issued and filed in the lower court (Tr. p. 73), wherein the lower court was specifically ordered and directed as follows:

"On consideration Whereof, it is now here Ordered, Adjudged and Decreed by this court, that finding No. 11 of the said District Court be changed to conform to the opinion of this court, and that the Decree of the said District Court be modified accordingly, and that as so modified, the said Decree be, and hereby is, affirmed, neither party to recover costs on the appeal."

By referring to the findings of the trial court in the record of the former appeal (Cause No. 2514, Tr. p. 55), we find that findings Nos. XI, XII and XIII, were as follows:

"XI. The court finds that the total indebtedness of said Klery Creek Mining Co., due to said Robinson-Magids & Co., or its assignee, Philip Murphy, with legal interest to date, amounts to $19,314.94, and that each of the said partners would be indebted to the said Klery Creek Mining Co. for the sum of $4828.73 less the credits above mentioned, and that the said defendant Lesamis is indebted to the said Klery Creek Mining Co. in the sum of $4429.21; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of $4703.21; that the said defendant Garbin is indebted to the said Klery Mining Company in the sum of $4215.40; that the plaintiff Greenberg is indebted to the Klery Creek Mining Co. in the sum of $5967.10.

XII.

The court finds that it was the intent and meaning of the parties in forming said co-partnership that the balance payment of $24,000 was to be paid from the net profits from the mining operations of the co-partnership property, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay, have received on the said sum of $24,000, the total sum of $5238.19, leaving a balance due to said defend-

ants or their assigns from the net profits, the sum of $18,761.81.

XIII.

The court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-quarter (¼) interest in said mining property, is not supported by the evidences and is untrue."

In order to strictly conform to the opinion and mandate of the appellate court, it was necessary to modify findings Nos. XII and XIII, as well as No. XI, so we find that when the case reached the lower court, the lower court entered and filed its amended findings (Tr. p. 97), wherein the said findings Nos. XI, XII and XIII, were changed and modified to read as follows:

"XI. The court find that the total indebtedness of said Klery Creek Mining Company, due to the said Robinson-Magids & Co., or its assignee, Philip Murphy, with legal interest to date, amounts to $19,314.94, and that and each of the said partners would be indebted to the said Klery Creek Mining Company for the sum of $4828.73, less the credits above mentioned, and that the said defendant Lesamis is indebted to said Klery Creek Mining Company in the sum of $2875.33; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of $3149.33; that the said defendant Garbin is indebted to the said Klery Creek Mining Company in the sum of $2661.52; that the said plaintiff Greenberg is indebted to the Klery Creek Mining Company in the sum of $10,628.76.

XII.

The court finds that it was the intent and meaning of the parties in forming said co-partnership that the balance payment of $24,000 was to be paid from one-fourth of the gross output from the mining operations of the co-partnership property, to which the said grantee, H. Greenberg, would be entitled, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay have received on the said sum of $24,000, the total sum of $5238.19, leaving a balance due to said defendants or their assigns from the one-fourth gross output, the sum of $18,761.81.

XIII.

The court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-fourth (¼) interest in said mining property, is supported by the evidence, and is true."

Based on said amended findings, the trial court thereafter entered its amended decree in conformity to the opinion and mandate of this court (Tr. p. 111), changing and modifying the original decree as directed by the appellate court, and in no other particular.

We contend that the only point to be considered by the appellate court on this appeal was whether or not the trial court obeyed the mandate issued on the former appeal. The amended findings and the amended decree show that the trial court strictly and definitely carried out the orders of the appellate court and that its amended decree in this regard should be affirmed. We contend, further, that all

of the other alleged appeals joined with this appeal should be dismissed for want of merit.

> "If the directions of the mandate are precise and unambiguous, it is the duty of the lower court to carry it into execution without looking elsewhere, even to the opinion, for authority to alter its meaning."
>
> West v. Brashear, 14 Pet. (U. S.) 51.

For correction of a supposed error in the appellate judgment, another appeal will not lie from a compliance therewith—the only remedy is by rehearing in the appellate court.

> 3 Cyc., 489;
> Jackson v. Tift, 23 Ga. 46;
> Boggs v. Williard, 22 Am. Rep. 77;
> Gillespie v. Scott, 32 La. Ann. 767;
> Jenkins v. Guaranty Trust Co., 38 Atl. 695;
> Merrimon v. Lyman, 36 S. E. 44;
> Anderson v. Woodward, 24 S. E. 1037;
> Lowell v. Ball, 58 Tex. 562;
> Southard v. Russell, 16 How. (U. S.) 547.

When the mandate reached the lower court, a new trial was unnecessary and no further evidence was offered, nor has the evidence or the record been changed in any particular whatever, but stands today the same as it did on the former appeal except as to the amended findings and amended decree as above set forth.

> "It is the general rule that, as to those questions embraced therein, the decision of the appellate court is binding on the lower court

in its further proceedings, even though such decision be in fact erroneous; and, where there is no change in the facts, it is the duty of the court below to adopt and follow the views expressed. The decision stands as the law of that particular case, even though principles inconsistent with those on which it is based have been established in other cases."

3 Cyc., 492;

Gaines v. Caldwell, 148 U. S. 228.

"It is a rule of general application that the decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested."

4 Corpus Juris, 1093.

The application of this general rule is shown and supported by the following cases:

Stone v. Southern Ill. Bridge Co., 206 U. S. 267;

New York Mutual Life Ins. Co. v. Hill, 193 U. S. 551;

Chamberlain v. Browning, 177 U. S. 605;

Stone Co. v. U. S., 195 Fed. 68;

U. S. v. Axman, 193 Fed. 644;

Higgins v Eaton, 188 Fed. 938 (reversed, on other grounds, 202 Fed. 75);

Development Co. of America v. King, 170 Fed. 923;

Mutual Reserve Fund Life Association v. Ferranbach, 144 Fed. 342;

Burow v. Grand Lodge, 134 Fed. 1021;

Olsen v. N. P. Lumber Co., 119 Fed. 77;

N. Y. R. Co. v. Lehtohner, 204 Fed. 775;

National Steamship Co. v. Kans. C. H. P. I. Co., 182 Fed. 54;

Ouray County v. Geer, 108 Fed 478;

Mohrenstecher v. Westervelt, 87 Fed. 157.

This same rule has been announced by the Supreme Court of every state in the union, time and time again. In support of the same, we cite the court to the following state cases:

Arizona-Parral M. Co. v. Forbes, 146 Pac. 504 (Ariz.);

Great Plains W. Co. v. Lamar Canal Co., 71 Pac. 1119 (Colo.);

New Haven Trust Co. v. Camp. 76 Atl. 1100 (Conn);

Anthony Shoals Power Co. v. Forston, 83 S. E. 137 (Ga.);

Nampa v. Nampa, 131 Pac. 8 (Idaho);

Spitzer v. Schlatt, 94 N. E. 504 (Ill.);

Cleveland R. C. v. Lynn, 177 Ind. 311;

Blizzard v. Growers' Canning Co., 148 N. W. 973 (Iowa);

Taylor v. Pierce, 220 Mass. 254;

Myers v. Erwin, 180 Mich. 469;

Blakely v. J. Neils L. Co., 128 Minn. 465;

Henry v. Lincoln, 97 Neb. 865;

People v. Queens School Board, 161 N. Y. 598;

Beard v. Royal Neighbors of America, 60 Or. 41;

Melker v. Hazen, 247 Pa. 122;

Galveston Co. v. Galveston Gas Co., 72 Tex. 509;

Houtz v. Union Pac. P. R. Co., 35 Utah 220;

Silvain v. Benson, 83 Wash. 271;

Roach v. Sanborn Lumber Co., 140 Wis. 435.

"The general rule, nakedly and baldly put, is that legal conclusions of law, announced on a first appeal, whether on the general law or the law as applied to the concrete facts, not only prescribe the duty and limit the power of the trial court to strict obedience and conformity thereto, but they become and remain the law of the case in all after-steps below or above on subsequent appeal."

Mangold v. Bacon, 237 Mo. 496;

Fletcher v. Hickman, 208 Fed. 118;

Jeffrey v. Osborne, 145 Wis. 351.

"The 'law of the case' is a phrase which has been formulated to give expression to the rule that the final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts, establishes the right of the parties in and to that controversy and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto, from afterwards questioning its correctness."

Klauber v. San Diego Street Car Co., 98 Cal. 105;

"The law of the case, as applied to a former decision of an appellate court merely expresses the practice of the courts in refusing to reopen what has been decided."

Mesinger v. Anderson, 225 U. S. 436.

"Assignments of error determined on a former appeal, adversely to appellants taking a second appeal, will be overruled."

Harris v. Wagnon, 162 S. W. 2.

"That different reasons in support of the question are given on the second appeal does not alter the rule."

Ruttle v. What Clear Coal Co., 125 N. W. 787 (Mich.).

"The reason for the rule of the finality of the appellate decision is sometimes alleged, without direct reference to either *stare decisis* or *res judicata,* to be found in the want of power in an appellate court to modify its own judgments otherwise than on a rehearing, and in that the issuance of a mandate for a retrial takes the case out of its jurisdiction."

Peck v. Sanderson, 18 How. (U. S.) 42;

Balch v. Haas, 73 Fed. 974.

The rule has been said to be

"Necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal."

Great Western Telephone Co. v. Burnham, 162 U. S. 339.

"There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticism on their opinions, or speculate of chances from changes in its members."

Roberts v. Cooper, 20 How. (U. S.) 467;

Standard Sewing Machine Co. v. Leslie, 118 Fed. 557.

"In accordance with the above general rule, where, after a definite determination, the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate."

U. S. v. Camou, 184 U. S. 572;

People v. Ill. C. R. Co, 184 U. S. 77;

U. S. v. N. Y. Indians, 173 U. S. 464;

Taenzer v. Chicago R. Co., 191 Fed. 543;

Beiseker v. Moore, 174 Fed. 368;

Haley v. Kilpatrick, 104 Fed. 647;

Gregory v. Pike, 77 Fed. 241.

"If the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal."

U. S. v. N. Y. Indians (supra);

MacKell v. Richards, 116 U. S. 45;

Humphrey v. Baker, 103 U. S. 736;

Cook v. Porter, 11 Wall. 672;

Tyler M. Co. v. Last Chance M. Co., 97 Fed. 394;

In re Pike, 76 Fed. 400;

Martin v Platt (N. Y.) 30 N. E. 66;

Great N. R. Co. v. Western U. T. Co., 174 Fed. 321.

The latter case is one of the principal cases cited and relied upon by appellants in their brief, but we fail to find any consolation for them in the court's opinion. In that case the court says:

> "It is the established rule in the courts of the United States that when a case comes the second time before an appellate court, by appeal upon the same facts, what was decided at the first appeal constitutes the law of the case, and will not be again examined touching its soundness."

And again the court says in the same case:

> "A second appeal to the same court can not be made to perform the office of a petition for rehearing or a bill of review."

> "Although there are cases which hold that an appellate tribunal is bound by its prior decision only on the points distinctly made and determined, and not on points which might have been raised, but were not, the general rule is that, on a second or subsequent appeal or writ of error, the court will not consider matters assigned as error, which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, nor matters appearing in the original record which might have been corrected on the first hearing, but were not urged."

Clark v. Brown, 119 Fed. 130;

Rep. M. Co. v. Tyler M. Co., 79 Fed. 733.

> "It may be stated generally that a court of review is precluded from agitating questions which were propounded, considered, and decided, on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes 'the law of the case' upon a subsequent appeal; the only mode for reviewing the decision on the prior appeal being by motion for a rehearing."
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> 2 R. C. L., Sec. 187;
>
> Wells on Res Adjudicata and Stare Decisis, Sec. 613, p. 569.

If the lower court had misconstrued the mandate or if the appellate court in issuing its mandate had remanded the case for further proceedings in the discretion of the trial court and the trial court had then refused to give appropriate relief, or if some mistake had been made by the trial court in attempting to carry out the mandate of the appellate court, then there would be some reason for citing and discussing the cases that are relied upon by the appellants in their brief, but under the facts in the case at bar, we fail to see where any of said decisions so discussed and cited by appellants, have any bearing whatever, in deciding this appeal. The transcript shows conclusively that the trial court carried out the terms of the mandate to the letter and that no reason for a second appeal exists.

The whole brief of appellant in this case, is a caustic criticism, reagitation, and an attempted re-examination of the decision of the former appeal.

Counsel for appellants seem to devote most of their brief in an attempt to criticise the decision of the lower court and necessarily the decision of the appellate court on the former appeal in affirming the lower court, and in an attempt to secure a rehearing of their alleged grievances. The transcript in the case shows that when the mandate was filed in the lower court, the appellants there sought to have the trial court enter into a new accounting between the co-partners. They there attempted to get an accounting by setting up a lot of imaginary facts by affidavit that were not in evidence at the former trial and their motion was properly and promptly overruled by the trial court in obedience to the mandate of the appellate court.

On page 18 of appellants' brief on this appeal, counsel states: "An examination of the findings in this case will show that the method of accounting by the trial court was so unique and so simple as to *create suspicion.*" Such language is insolent and contemptuous, especially in view of the fact that this Honorable Court had already, in the former appeal, affirmed the accounting made by the trial court.

We do not deem it necessary to discuss the various points in the evidence mentioned by the appellants in their brief for the reason that we covered all of said points in our brief in the former appeal and if this Honorable Court deems it necessary to consider any of said points, we respectfully refer the court to our former written brief on file

in the former appeal (Cause No. 2514), where all of the points, discussed by appellants, are thoroughly answered.

In their brief, the appellants complain bitterly because certain indebtedness that they claim the Klery Creek Mining Company owed to Stanley and Sallo, Lesamis and others remained unpaid. To show the court how ridiculous and untrue the contention is, we cite the court to their sworn answer in the cause (Tr. p. 29), wherein they state as follows:

> "These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small account in favor of S. B. Marshal and Cayhill, in the sum of $2.50, and that these defendants are abundantly able to pay the same."

This court in its opinion in the former appeal in commenting on the indebtedness, said that no one was insisting on this small amount being paid. The truth is that the said item was long since paid by the appellee, as he has had to pay everything else since he first met the appellants.

Should the court conclude that it was necessary to determine whether any injustice had been done the appellants, we submit that in reading the transcript on the former appeal, the court will find that the record is undisputed that Greenberg paid to the appellants the sum of $2000 for groceries and supplies, $6000 in cash and over $5000 in gold and gold-dust and that said appellants never, at any time, advanced a dollar out of their pockets to carry on

the mining enterprise; that when the partnership was dissolved, it had an indebtedness of over $19,000, which was owed to the firm of Robinson-Magids & Co., of which Greenberg was a co-partner; that Greenberg has had to pay the said $19,000 to his mercantile firm and has never received a cent in contribution from the appellants. The facts are, that the mining claims have been forfeited and abandoned as worthless and Greenberg has had to pay the indebtedness of the mining co-partnership because he was solvent. The appellants are insolvent and notwithstanding the fact that Greenberg has paid the sum of $6000 in cash to them out of his pocket, $2000 in groceries, and paid them over $5000 from the gold-dust extracted from the claims and has paid the debts of the firm amounting to over $19,000, he has never molested them by even taking out an execution to attempt to recover a cent from them since the decree was affirmed in the former appeal. Most of the appellants have left that country and departed and the only ones that remain to make trouble and further expense by this second appeal and other vexatious suits subsequently brought at Nome, are Stanley and Sallo, whom the record shows were the instigators of all the trouble between the co-partners.

The record in the former appeal conclusively shows that this litigation never would have occurred if it had not been for said Stanley and Sallo. The appellee contends that this appeal is being prosecuted by said Stanley and Sallo with

no other purpose than to harass appellee by continuing the litigation.

The history of this case shows that at the trial in the court below, the appellee submitted all the evidence within his reach to show and inform the court of the exact amount of assets and expenses, and aided and assisted the court in every way within his power to arrive at a correct accounting. On the other hand, the record shows that the appellants, the defendants in the court below, in their answers denied that the co-partnership existed beyond the year of 1910, and did everything within their power to prevent an accounting, resisting appellee's efforts to reach a correct accounting by taking possession of and holding the books and records of the concern, and by resisting appellee's efforts to have a receiver appointed to collect the royalty and other assets of the mining co-partnership. In view of such conduct, it ill-becomes the appellants to now criticise the trial court and the appellate court for not rendering an accounting according to their views.

We submit that this cause, having been fully and fairly decided by this Honorable Court on the former appeal, and the trial court having fully complied with the opinion and mandate of this court on said former appeal, that this litigation should be terminated by an order dismissng the said appeals and

affirming the amended decree entered by the lower court.

Respectfully submitted,

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